The Coca Cola Company, Foods Division *and* United Steel Workers of America, AFL-CIO-CLC. Cases 21-CA-21076 and 21-RC-16947

February 11, 1983

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 15, 1982, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions of law, as modified herein,[1] and to approve the settlement agreement of Respondent Employer and the Union.[2]

ORDER

The National Labor Relations Board approves the settlement agreement of Respondent Employer and the Union, and hereby orders that the Respondent, the Coca Cola Company, Foods Division, Santa Ana, California, its officers, agents, successors, and assigns, shall take the action set forth therein.

IT IS FURTHER ORDERED that the election in Case 21-RC-16947 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 21 to conduct at the place the previous election was held a new election at the earliest time he deems the circumstances will permit the free choice of a bargaining representative, but in no event shall the election be held before March 31, 1983, and the election notices shall be in both English and Spanish, and other procedures shall be in accordance with Board practice.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union membership, activities, and sympathies, and the union membership, activities, and sympathies of their fellow employees.

WE WILL NOT solicit employee grievances while creating the impression that such grievances will be remedied.

WE WILL NOT engage in conduct which creates the impression that our employees' union activities are under surveillance.

WE WILL NOT distribute or mail to our employees campaign literature which misrepresents their rights and obligations under Section 7 of the National Labor Relations Act pertaining to union-security obligations.

WE WILL NOT prohibit the wearing of union insignia by disparately and discriminatorily enforcing our policies and rules pertaining to personal appearance or the wearing of jewelry.

WE WILL NOT confiscate and discriminatorily remove union literature from the employee breakroom. However, no posting will be allowed. Nothing herein shall prohibit the lawful distribution of literature in the plant.

WE WILL NOT in any like manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

THE COCA COLA COMPANY, FOODS DIVISION

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: These consolidated cases were heard before me in Santa Ana, California, on September 21, 1982. The matter arose as follows: United Steelworkers of America, AFL-

[1] The settlement agreement of the Employer and the Union in this consolidated proceeding provides for a remedial notice in Case 21-CA-21076, and stipulates as to Case 21-RC-16947 that the election held on March 26, 1982, be set aside and that a second election be conducted by the Regional Director at the earliest time he deems the circumstances will permit the free choice of a bargaining representative, but in no event before March 31, 1983. The General Counsel opposed said agreement because it limits the Regional Director's discretion concerning the timing of the election. Customarily, the notice should be posted for 60 days to assure a free choice of bargaining representative. Accordingly, absent circumstances not present here such as a waiver by the Charging Party, the election could not be held sooner than the foregoing date. For that reason, we approve the settlement agreement and find it unnecessary to rule on the Administrative Law Judge's second conclusion of law regarding his power to recommend approval of a settlement agreement which includes the direction of an election on a specific date.

[2] As the Employer and the Union apparently expected the Regional Director to approve the settlement agreement, the caption of their stipulated notice states that it was approved by the latter. In view of the General Counsel's refusal to do so, we shall modify the caption to show its approval by the Board.

CIO–CLC (the Petitioner, the Charging Party, or the Union), filed a representation petition on an unknown date[1] docketed as Case 21–RC–16947 seeking to represent certain employees of The Coca Cola Company, Foods Division (the Employer or Respondent). Pursuant to a Stipulation Upon Consent Election approved by the Regional Director for Region 21 of the National Labor Relations Board (Regional Director) on March 3, 1982, an election was conducted on March 26, 1982, in an agreed-upon unit appropriate for collective bargaining. At the conclusion of the election, the tally of ballots indicated the Union had failed to receive a majority of valid votes cast and that the challenged ballots cast could not be determinative of the result.

On March 8, 1982, the Union filed a charge docketed as Case 21–CA–21076 against Respondent. On April 2, 1982, the Union filed timely objections to the election. On April 21, 1982, the Regional Director issued a complaint and notice of hearing in Case 21–CA–21076. On May 4, 1982, the Regional Director issued a Report on Objections and Order Directing Hearing and Order Consolidating Cases and Notice of Hearing directing that a hearing be held on the matters raised by the Union's objections in Case 21–RC–16947 and consolidating that matter with the previously directed hearing on the unfair labor practice case.

The complaint alleges certain acts and conduct attributed to Respondent which violate Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). The Union's objections allege certain acts by Respondent's agents, including a general paragraph which may be said to incorporate the post-petition, but preelection conduct alleged in the complaint, at least some of which, if credited, could require the election to be set aside under current Board law. Respondent disputes the factual allegations of wrongdoing in its answer to the complaint and contested the allegations in the Union's objections.

All parties were afforded the right to appear and to present oral argument regarding the issues in the case and the Union's and the Employer's joint proposed settlement of the cases and to file briefs with regard thereto. Upon the entire record of the case, including a brief from counsel for the General Counsel, I make the following:

FINDINGS OF FACT

I. PROPOSED UNILATERAL SETTLEMENT

A. *Background and Procedural Context*

Before the opening of the hearing and at the invitation of the parties, the parties and I held lengthy settlement discussions directed toward resolution of all issues raised by the pleadings. Informal discussions produced agreement between the Employer and the Union to a joint settlement agreement, which agreement the General Counsel opposed. At the commencement of the hearing, after the formal papers were introduced and motions to amend the pleadings were made and ruled upon, the Employer and the Union moved that I approve their joint settlement agreement. I heard argument on the merits of the settlement agreement and thereafter postponed the hearing indefinitely in order to provide opportunity for all parties to brief the issues raised by the motion. No evidence was received or considered concerning the merits of the Union's objections or the allegations contained in the complaint.

B. *The Proposed Settlement of the Union and the Employer*

The Union and the Employer submitted into evidence a proposed settlement of both the unfair labor practice case and the objections hearing in the representation case. While the proposed settlement consists of separate documents and stipulations for each case, the settlement was expressly offered as a combined, inseparable package; i.e., neither the settlement regarding the unfair labor practice case nor the settlement of the objection case was offered by the parties if approval of the other portion of the settlement was withheld.

Regarding the unfair labor practice case, the Union and the Employer proposed an informal settlement agreement for my approval which included traditional cease-and-desist language and the posting of a standard remedial notice to employees in both Spanish and English. The Union and the Employer proposed, in complete settlement of the dispute regarding the Union's objections to the conduct of the election, that the election be set aside, without findings of fault, and that the Regional Director be directed to conduct a new election in accordance with normal Board standards. This proposed settlement included a limitation on the date and place of the new election. The election was to be held at the same place as the previous election and was to be held on March 31, 1983, or as soon thereafter as possible if the delay in Board approval of the settlement requires a later election date under normal Board election procedures and decisional law.

C. *Argument Regarding the Proposed Settlement*

Counsel for the General Counsel on behalf of the Regional Director opposed the settlement at the hearing and on brief. Counsel for the General Counsel made it clear her opposition to the settlement did not turn on the proposed unfair labor practice portion of the settlement which was acceptable to her. Rather her opposition stemmed from the provision of the March 31, 1983, date for the rerun election.

The General Counsel's arguments may be fairly summarized as follows. First, rerun elections should be held sooner than the Union and the Employer provide in their proposed settlement. Counsel for the General Counsel correctly asserts that normally elections "have been held shortly following the 60-day posting period [of the Notice to Employees provided in the unfair labor practice settlement], absent extenuating circumstances, none of which [are] present here." She argues further, "a long term hiatus between the stipulation and the actual rerun election thwarts the Board policy relative to the prompt processing of petitions."

[1] The petition was not offered into evidence.

Second, counsel for the General Counsel argues, the provision of a fixed election date undermines the traditional discretion of the Regional Director to direct an election "at such time as the Regional Director deems appropriate." She adds:

> More importantly the acceptance of the stipulation as to the objections would amount to wholesale usurpation of the traditional and expansive discretion reserved to Regional Directors in matters affecting the holding of Board elections. In essence, if this case were to become established Board precedent, this arrangement in future cases could seriously undermine the Regional Directors' effectiveness and ability to administer the Board's procedures in representation proceedings.

Third, counsel for the General Counsel argues that I am without power or authority to approve the proposed settlement. She notes:

> Lastly, nothing in the Board's Rules and Regulations gives Administrative Law Judges the power to approve the time that a rerun election will be held or to direct that elections be held on a date certain. To approve the arrangement that the Union and the Respondent have proffered might seem to the Judge to be a quick and easy resolution of the matter, but it is far beyond the Judge's authority to approve over the objections of the Regional Office, which does most strenuously object.

The Union and the Employer argued that their proposed settlement, if approved, eliminates the need for lengthy and costly litigation thereby conserving the resources of the parties and the Government. Further, they argue that the settlement provides all that the General Counsel seeks in remedy of the alleged unfair labor practice violations and provides a rerun election date more quickly than if the case proceeds in a normal manner; i.e., from the Decision of the Administrative Law Judge through review by the Board of the Administrative Law Judge's Decision on exceptions to the Board's decision itself. Having given the General Counsel all its wants and giving it more quickly than could be obtained through litigation, the Union and the Employer argue, the General Counsel has no legitimate basis for objecting to the settlement. Lastly, the Union and the Employer argue that approval of the settlement avoids the disruption in the workplace that ongoing litigation with its usual contention and controversy entails and thus contributes to the industrial peace and stability that the Act was passed to ensure.

D. *Analysis and Conclusion Regarding the Settlement Agreement*

I agree with all the parties that the proposed settlement of the unfair labor practice portion of the consolidated cases provides a complete and satisfactory resolution of all issues raised by the complaint. I also agree with the parties that the settlement's provision for a rerun election without finding of fault is permissible and would constitute a satisfactory resolution of the issues raised by the objections, assuming the provision of the March 31, 1983, election date does not otherwise render the settlement unacceptable. Because the unfair labor practices portion of the settlement is conditioned on the approval of the entire package, it is clear that the single issue to be resolved is the propriety of the provision for a March 31, 1983, election date in the settlement agreement. I shall turn initially to the General Counsel's three opposing arguments.

1. Does the settlement impermissibly delay a new election?

There are essentially no facts in dispute regarding the election date. All parties agreed and I take judicial notice that, if this case were to require the average amount of time that passes from the date of hearing through an administrative law judge's decision and a Board decision on exceptions and through posting of remedial notices and the time necessary to allow normal direction of rerun election, any election date in this case would fall significantly after March 31, 1983. Thus, I agree with the Employer and the Union that their settlement provides for a new election sooner than counsel for the General Counsel and the Union can reasonably expect to obtain through litigation, even if they are completely successful in all their contentions. I also agree that an agreement to hold the rerun election 6 months in the future, i.e., September 21, 1982, to March 31, 1983, is unusual and would not without reason be consistent with the Board's mandate to conduct speedy elections.

I consider the essentially certain likelihood that approval of the proposed settlement will produce a speedier election than would be obtained if the matter had proceeded through litigation to be a significant factor favoring approval of the proposed settlement. I do not accept the implicit argument of the General Counsel that the Union is being forced to abandon an otherwise present entitlement, which the Regional Director must preserve even if the Union would abandon its right to a speedy election. The Union here has no right to a new election unless and until it prevails on its objections. More importantly, it cannot obtain a new election until the objections have been found by the Board to have merit. This process, as noted, takes time. Time is the heart of the matter. Since the Union cannot reasonably expect to prevail in sufficient time to obtain an election date before March 31, 1983, it gains a speedier election date by settling the case rather than by litigating it. This is the practical reality of the proposed settlement. The Union thus loses nothing in the settlement. The General Counsel's reference to a possible earlier election or to an election date to be set by the Regional Director without limitation on his discretion, should the parties agree, is not relevant because it is not an attainable reality. A settlement involving an election before March 31, 1983, was not acceptable. Disregarding that rejected possibility, what must be considered is the election date which will likely result from approving the proposed settlement as compared to that date which will likely result if the parties litigated the case. In that frame of reference the proposed settlement achieves a quicker election than litiga-

tion, the only true alternative to the settlement. Reversing the analysis, the only likely result of the General Counsel's recommended rejection of the settlement, disregarding the possibility of a loss on the merits, is a delay, likely substantial, in the conducting of the rerun election. Accordingly, I find the settlement is not to be rejected because of the delay in holding a new election.

2. Does the settlement deny the Regional Director the necessary discretion to choose an appropriate election date?

I have determined, *supra*, that the proposed settlement does not improperly delay the election. What remains of the General Counsel's argument regarding the Regional Director's discretion is therefore that the settlement, by fixing a date certain for the election, improperly denies the Regional Director the discretion to select an election date when he feels it is appropriate under the circumstances then obtaining. There is always danger in approving an election with a specific election date, for unforeseen circumstances may cause difficulty or prevent an election from being properly held on a given date.[2]

The proposed settlement however, in my view, does not prevent the Regional Director from delaying the election, in his reasoned discretion, to a date later than March 31, 1983, if he feels it necessary and appropriate. The parties originally proposed the fixed election date when they expected the settlement would be an all party settlement which would, by means of a waiver of all parties' right to seek review, have made any order by me approving the settlement both final and effective immediately. Such an immediate settlement occurring in September 1982 would have virtually eliminated any likely need to delay the election beyond the March 31, 1983, date. When the Union and the Employer proposed the settlement to me as a unilateral settlement over the General Counsel's opposition, I pointed out on the record that the General Counsel's opposition, even if not ultimately successful, could delay Board approval of the settlement and ultimately, through passage of time, make the March 31, 1983, date for the election impossible to meet. The parties were well aware of this fact in proposing their settlement and I interpret it in that spirit. I will not reject the proposed settlement because of the danger that the election date cannot be met or that it will be inappropriate to conduct an election on that specific date. Rather I find it reasonable to construe and do construe the election date proposed in the settlement, based on the colloquy at the hearing, to be intended to be the earliest possible date for the election. I find that the proposed settlement contemplates that the Regional Director will have the discretion to hold the election at a later date if delay in final approval of this settlement or other factors require delay so as to comply with normal Board procedural and decisional requirements. See, e.g., *Efcor Die Casting Corporation*, 231 NLRB 263 (1977). Thus the Regional Director will not be forced to hold the election when it would not otherwise be appropriate.[3]

Given my previous finding that the proposed March 31, 1983, election date does not fatally delay the election, and my finding here that the Regional Director will have the discretion to delay the election if he deems circumstances require it, I find no merit to the General Counsel's argument that the Regional Director's discretion to set election dates is impermissibly fettered by the settlement.

3. Does an administrative law judge have the authority to approve a settlement which sets a specific election date and place?

There is no dispute that the Board's Rules and Regulations, Section 101.9(d)(1), empower an administrative law judge to approve an otherwise appropriate unilateral informal settlement in an unfair labor practice case. Thus, my power to approve the unfair labor practice portion of the proposed settlement is not in dispute. Nor does the General Counsel oppose or contest my power to approve the settlement in the representation case save insofar as the settlement includes a specific election date. The General Counsel's argument on this issue, which is set forth in its entirety, *supra*, is that I have no authority to approve a specific date for the election when the General Counsel objects. Such a power, it is argued, would "impinge on the Board's delegation to the Regional Director of the authority to determine the appropriate election dates." The General Counsel's argument on the issue is without citation to authority.

Given the General Counsel's attack on my authority to approve the representation case settlement, it is initially appropriate to examine the provisions of the Board's regulations dealing with the question. The parties to the representation case entered into a contest election agreement as contemplated by the Board's Rules and Regulations Section 102.62(b). Agreements under that section provide that postelection procedures "shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70." Section 102.69 provides for hearings before an administrative law judge in situations involving consolidated representation and unfair labor practice cases. In such circumstances, as here, Section 102.69(f) provides, in part, that an administrative law judge:

> . . . shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report.

The Regional Director, in issuing a notice of hearing on objections following proceedings under Section 102.62(b), automatically transfers the case to the Board

[2] These difficulties can be overcome. The Regional Offices regularly solicit election agreements from parties setting forth specific election dates; cf., the Board's Casehandling Manual par. 11084.3.

[3] The parties are of course aware of the obligation of Regional Directors under the Act to hold elections as soon as possible where not otherwise inappropriate. Thus it may be assumed the Regional Director will not unnecessarily delay the election.

pursuant to Section 102.69(1). The recommendations of the administrative law judge in the objections case, under the provisions noted, may be excepted to under Section 102.46 and, in the absence of exceptions, may become the decision and order of the Board under the provisions of Section 102.48(a).

These provisions indicate to me that by issuing his order directing a hearing on objections, the Regional Director transferred the instant representation case to the Board and it is now for the Board to decide the issues raised by the Regional Director's order, the Union's objections, and the proposed settlement. In this matter, I act as agent of the Board and am charged to make recommendations to it as to the disposition of the objections including the propriety of the proposed settlement. These recommendations will be adopted, modified, or rejected by the Board. In any case, the final disposition of this matter will be made by the Board.

Given this regulatory scheme and my role therein, I am unable to agree with the General Counsel that my approval of the settlement would conflict with the Board's delegation to its regional directors of the authority to determine election dates. In approving the proposed settlement, I would do no more than recommend to the Board a particular course of action. It will be the Board which rejects, modifies, or adopts such a recommendation. Thus, I have the power to recommend that which the Board has the power to approve. I do not accept the General Counsel's view that the Regional Director's delegated authority prevents the Board from approving a specific election date in appropriate cases[4] even in the face of opposition by a regional director. Therefore, I do not find my power to recommend the settlement agreement to the Board is circumscribed by the Board's delegation of authority to the regional directors.

Given all the above, I find I have the power and authority to make recommendations to the Board regarding the disposition of the objections herein and that this authority includes the power to recommend approval of a settlement calling for the direction of a new election by the Regional Director at a specific date and at a specific place as clarified, *supra*. Accordingly, I reject the General Counsel's view that I am without authority to recommend approval of the settlement proposed by the parties.

4. Conclusion

I accept the arguments of the Union and the Employer that acceptance of their settlement will conserve the resources of the parties and the Board by abbreviating and resolving the instant litigation. I further accept their argument that approval of their settlement will speed processing of the matters in dispute and will reduce the uncertainty confronting the parties and more quickly remedy arguable wrongs and allow employees to expeditiously pursue the rights guaranteed them by the Act. I also agree that a significant additional benefit of the settlement will be the avoidance of the conflict and controversy inevitably resulting from the litigation of disputed workplace events and that, accordingly, approval of this settlement will reduce the dangers of industrial conflict and increase the likelihood of resolution of the continuing question concerning representation with harmony and dispatch. Conversely, I find that if the General Counsel prevails and the settlement is not approved there will be, as a direct consequence, (1) increased costs to all parties including the Government, (2) substantial delay and uncertainty in resolving the issues in dispute, and (3) the enhanced likelihood that the continuing dispute between the parties will inhibit the purposes and policies of the Act as set forth in Section 1(b) thereof. I also reject the General Counsel's argument that approval of a settlement which produces so desirable a result will undermine regional directors' authority in representation case-handling.

I further find that I am empowered by the Act and the Board's Rules and Regulations to recommend approval of a settlement of the type proffered here and specifically reject the contention of counsel for the General Counsel that I am without authority to do so.

I have found that I have the power and authority to approve the settlement and that it would effectuate the purposes and policies of the Act to do so. Accordingly, I shall recommend approval of the settlement agreement tendered by the Union and the Employer to the Board, irrespective of the opposition of the General Counsel.

Based on the foregoing findings of fact and the record as a whole I make the following:

CONCLUSIONS OF LAW

1. The informal settlement agreement proposed by the Union and the Employer in settlement of Case 21-CA-21076 effectuates the purposes of the Act and, as part of a joint settlement with the settlement in Case 21-RC-16947, may and should be approved pursuant to the Board's Rules and Regulations Section 101.9(d)(1).

2. An administrative law judge hearing a consolidated case including a hearing on objections directed by a regional director pursuant to Sections 102.62 and 102.69 of the Board's Rules and Regulations has the power to consider and recommend approval of settlement agreements and stipulations which include the direction of a new election on a specific date and at a specific place, even over the opposition of the regional director, where otherwise appropriate.

3. The settlement agreement and stipulation proposed by the Union and the Employer in settlement of the dispute regarding the Union's objections in Case 21-RC-16947, as part of a joint settlement with the settlement in

[4] Although counsel for the General Counsel does not specifically identify the delegation she refers to, I assume she refers to the Board's April 28, 1961, delegation, to regional directors, reported at 26 F.R. 3911, in which the Board, *inter alia*, delegated to regional directors its powers "to direct an election or take a secret ballot under subsection (c) or (e) of Section 9 [of the Act] and certify the results thereof." The delegation implicitly gives regional directors the authority to set the date and place of an election inasmuch as these are part and parcel of any direction of an election. Since the Board regularly directs regional directors to conduct new elections in cases in which it determines objections are meritorious, it is clear the Board has not delegated away its power to direct regional directors to conduct elections. The Board and regional directors each have election direction power in appropriate cases. It follows by analogy that the Board also retains the power to direct a regional director to conduct an election at a specific time and place.

Case 21-CA-21076, may and should be approved by the Board and its terms carried out.

Based on the above findings of fact, conclusions of law, and the record as a whole, and pursuant to Sections 101.9(d)(1) and 102.62 of the Board's Rules and Regulations, I issue the following recommended:

ORDER[5]

1. The settlement agreement proposed by the Employer and the Union in Case 21-CA-21076 shall be and it hereby is approved.

2. The settlement agreement and stipulations proposed by the Employer and the Union in Case 21-RC-16947 shall be and they hereby are approved and, accordingly, the following is further recommended:

a. That the election previously conducted be set aside, by agreement of the parties, without finding of fault.

b. That case 21-RC-16947 be remanded to the Regional Director for Region 21 for the purpose of conducting a new election at the earliest time he deems the circumstances will permit the free choice of a bargaining representative, but in no event shall the election be held before March 31, 1983, further, the election shall be held at the place the previous election was held, provided further, election notices shall be in both English and Spanish languages and other procedures will be in accordance with normal Board practice.

3. Because the settlement agreements tendered by the Employer and the Union were expressedly made indivisible by the parties, in the event either settlement agreement is disapproved by the Board, the approval of the other shall likewise be withheld and/or set aside.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.